Supreme Court, U. S.
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No. 80-451 and 80-452

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ALBEMARLE COUNTY SCHOOL BOARD,

Petitioner,

v.

SUSAN PAXMAN,

Respondent.

and

HENRICO COUNTY SCHOOL BOARD,

Petitioner,

v.

LESLIE GOUGH,

Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITIONS FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit in *Paxman, et al. v. Campbell, et al.*, 612 F.2d 848 (4th Cir. 1980), erred in awarding attorneys' fees to respondents under 42 U.S.C. § 1988?

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STATEMENT OF THE CASE

On December 6, 1971, the respondents, Susan Paxman and Leslie Gough, brought a bilateral class action under 42 U.S.C. § 1983 on behalf of all public school teachers in Virginia. They sought declaratory relief, as well as

backpay, claiming that their teaching contracts were terminated in violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. Specifically, respondents asserted that the mandatory maternity policies enforced by Virginia school boards were unconstitutional.

On November 22, 1972, the district court entered summary judgment in favor of the plaintiff class on the constitutional violations and determined that the suit should be maintained as a class action under F.R.C.P. 23(b)(1).[1] The district court overruled itself on the constitutional violations upon the Fourth Circuit's decision in *Cohen v. Chesterfield County School Board*, 474 F.2d 395 (4th Cir. 1973). Finally, in March, 1975, the district court entered summary judgment for the respondents' class upon this Court's decision in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), reversing the Fourth Circuit's decision in *Cohen*.[2] By that order, the district court also, *sua sponte*, amended the defendant class to consist of members of school boards, rather than the school boards themselves, and re-designated this action as a class action under F.R.C.P. 23(b)(2). Finally, the district court ordered that respondents' class be granted reinstatement with backpay.

The district court's order was appealed by both sides, after which briefs were filed and oral argument was held before a panel of the United States Court of Appeals for the Fourth Circuit.

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[1] App. 36(a). References to the appendix are to be found in respondent's Petition for Writ of Certiorari, No. 80-270.

[2] App. 2(a).

On January 2, 1980, the Fourth Circuit upheld the district court's decision in two major respects.[3] First, the court upheld the judgment of declaratory relief against the unconstitutional policies of the school boards. Secondly, the court ordered reinstatement to the named plaintiffs, respondents herein. The Fourth Circuit reversed the district court's order certifying respondents' class under F.R.C.P. 23(b)(2), dismissing all but the named plaintiffs and the respective school boards with whom they had contracts, without prejudice to the rights of the dismissed members of respondents' class.[4]

SUMMARY OF ARGUMENT

Petitioners claim that the Fourth Circuit's award of attorneys' fees to the respondents was improper, claiming that respondents did not prevail on any significant issue on appeal. Petitioners ignore the appellate court's order granting respondents reinstatement and declaratory relief. That respondents did not prevail on all issues is of no consequence except in determining the amount of fees to be ultimately awarded. In arguing that the Fourth Circuit's opinion did not benefit the respondents, petitioners inappropriately seek to have this Court re-decide the substantive issues settled by that court. Respondents did prevail on appeal in two respects, and therefore, an award of attorneys' fees was appropriate.

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[3] App. 28(a).

[4] These persons are either free to file motions for intervention with the district court or to file their own suits, as set forth in foot note 11 of the appellate court's decision, if necessary to secure their rights. App. 41(a).

ARGUMENT

A. Respondents Prevailed In Two Respects: Reinstatement And Declaratory Relief From The Petitioners' Constitutional Violations.

Petitioners claim that the respondents did not prevail on appeal. Their position is simply a misstatement of the Fourth Circuit's ruling in this matter. All seven judges of the Fourth Circuit recognized that respondents are entitled to an award of attorneys' fees on appeal for prevailing on either the issue of reinstatement or the constitutional violation.[5] Judges Haynesworth, Russell and Philips, who would have denied reinstatement, felt that an award of attorneys' fees was appropriate in light of the declaratory relief granted to the respondents. App. 63(a). Judges Widener, Winter, Butzner and Hall recognized that the order of reinstatement was sufficient to justify an award of fees. As Judge Widener's majority opinion recognized:

> "While the defendants have substantially prevailed in these appeals, we think the plaintiffs are entitled to an attorney's fee, from the Henrico and Albemarle defendants, in the amount of $500, for defending their reinstatement on appeal, for on that one aspect they prevailed." (App. at 55(a))

Petitioner Albemarle County attempts to avoid liability for attorneys' fees on a second ground, claiming that Mr. Paxman did not suffer any constitutional violation.[6] This point was specifically appealed by Albemarle County

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[5] See, *per curiam* order, App. 31(a).

[6] Cross-petitioner, Henrico County, does not set forth this defense with respect to Mrs Gough.

to the Fourth Circuit and was summarily rejected in Part III of the majority opinion:

> "Appellants' contention that the maternity leave policies under which Mrs. Paxman and Mrs. Gough lost their jobs were not constitutionally defective under *Cleveland Board of Education, supra*, does not need extended discussion. The district court found that the two policies contained the same 'irrebuttable presumption of unfitness' found unconstitutional by the Supreme Court. We agree, and, for reasons stated by the district court, affirm its judgment on that point." (App. 42(a)).

Albemarle County's assertion that the lower court did not find a constitutional violation as to Mrs. Paxman is hence, without factual basis. This Court need not, and should not, re-decide the issue.

B. The Fourth Circuit's Decision Will Benefit All Members of Respondents' Class

Although the declaratory relief ordered by the Fourth Circuit does not directly apply to respondents' class, it is clear that the court's opinion will inure to the benefit of the dismissed class members nevertheless. Indeed, it is clear that that was intended by the court when it noted that a remand for a class action determination was not necessary to a "fair dispostion of potential claims arising out of the Henrico and Albemarle County maternity leave policies". The Fourth Circuit directed the district court to entertain sympathetically motions for intervention under F.R.C.P. 24 for those members of the respondent class who taught in those counties.[7] Hence,

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[7]The court further noted that the statute of limitations was probably tolled for all members of the class as originally certified.

it is clear that the Fourth Circuit intended the declaratory relief and the order of reinstatement granted to the named respondnets to inure to the benefit of all the original members of the class dispite the fact that the Fourth Circuit overruled the district court's class certification determination.[8]

C. An Award of Attorneys' Fees Is Appropriate Even Where A Party Does Not Prevail On All Issues.

It is of no consequence that respondents did not prevail on all the issues presented below. The extent to which they obtained all of the relief they sought is only one of many factors to be considered in setting an attorneys' fee. *See Wheeler v. Durham City Board of Education*, 585 F.2d 618, 624 (4th Cir 1978); *Burt v. Abel*, 585 F.2d 613, 617-18 (4th Cir 1978); *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir), *cert denied*, 439 U.S. 934 (1978); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir 1974).

It should be noted that this case has been marred by a lengthy procedural history during appeal. (See discussion of opinion of Judge Winter below. App. 86(a).) A decision in this matter was delayed twice requiring additional

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[8]It should be noted that the district court, *sua sponte*, re-designated the class as one under 23(b)(2) which, by its literal terms, does not permit relief against a defendant class. The district court had initially certified the class as one under 23(b)(1) which has no such apparent limitations. Had the district court not altered the class certification respondents would have then, of course, had the burden of establishing appropriate certification of the class under F.R.C.P 23(b)(1). It should not be held against them that the district court made the initial error, preventing them from attempting to do so.

efforts by: respondents were ordered by the Fourth Circuit, on its own motion, to re-argue the cases *en banc* prior to its decision. In 1979, the case was again stayed by the Fourth Circuit pending this Court's decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Subsequently, additional motions and supplemental briefs were filed by counsel. The time and effort expended by counsel to prevail on two issues out of several is to be accorded weight in making a determination as to attorneys' fees.

CONCLUSION

For the foregoing reasons, respondents urge this Court to deny petitioner's Cross-Petition For Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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